85-683

Supreme Court, U.S.
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No. ..-...

IN THE

# SUPREME COURT OF THE UNITED STATES

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October Term, 1985

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KWANG-WEI HAN,

Petitioner,

vs.

TONEY AND BRIGITTE PILATO,

Respondent.

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**Petition for a Writ of Certiorari to the Supreme Court of the United States.**

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Kwang-Wei Han,
P. O. Box 10701,
Santa Ana, Ca. 92711,
(714) 250-1313,

In Pro Per.

58P

## QUESTION PRESENTED FOR REVIEW

Does the Constitution protect a pro se from the fraudulent actions of the trained adversarial attorney in court?[1/]

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1/ This is not a question concerning an unequalled contest between a pro se and his trained opposing counsel.

Nor is it a question whether a party, who acts as his own attorney, should not be restricted to the same rule of evidence and procedure as those qualified to practice law, or be excused for failure to prove his cause of action on grounds of ignorance of the law.

In addition, it isn't even a question where in a free society everyone is looking after themselves and an attorney is doing his best for his client.

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No. ..-...

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1985

KWANG-WEI HAN,

Petitioner,

vs.

TONEY AND BRIGITTE PILATO,

Respondent.[2/]

**Petition for a Writ of Certiorari to the Supreme Court of the United States.**

## JUDGMENT AND OPINION BELOW.

The judgment of the trial court, rendered in the Superior Court of California, County of Orange, against Petitioner is attached hereto as Appendix "A" and the trial Court's Minute Order to reduce the damage against Petitioner hereto is attached as Appendix "B." The opinion of the Court of Appeal of the

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2/ Toney & Brigitte Pilato, Plaintiffs. Kwang-Wei Han, Irvine Safety Supply, Inc., Defendants, all parties inclusive.

State of California, Fourth Appellate District, Division Three, which affirmed the lower Court's judgment is attached hereto as Appendix "C." Petitioner's timely petition for hearing in the California Supreme Court, where the Federal question was raised, (see Appendix "D") was denied without opinion on July 24, 1985, which denial is attached hereto as Appendix "E."

**JURISDICTION**

The Judgment of the trial court was entered April 19, 1982. The decision of the Court of Appeal was filed May 14, 1985. Petition's timely petition for hearing before the California Supreme Court was denied on July 24, 1985. This petition for writ of certiorari is filed within ninety days of said latter date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

**CONSTITUTIONAL PROVISION INVOLVED.**

**Fourteenth Amendment to the United States Constitution.**

". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

**FEDERAL STATUTORY PROVISION INVOLVED.**

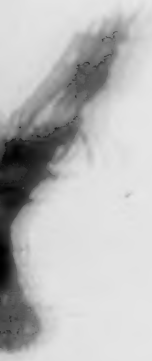
**Title 28, Section 1654 of the United States Code.**

"In all courts of the United States, the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

**STATEMENT OF THE CASE.**

In 1978 Petitioner Kwang-Wei Han entered into a business contract with Plaintiffs Toney Pilato and Brigitte Pilato whereby they would supply Han with industrial gloves for resale. The contract was to last for a period of two years, wherein the Pilatos would receive an annual return of 20 percent of their investment. In late 1978 about six months after the contract was entered and while Han was performing his part of the contract, Plaintiff Pilatos' attempted to rescind the contract so they could go into another and much more lucrative business. (This fact is not before any of the courts.) Han refused to obligate the Pilatos because not only did he need the contract in his business but was making profit on the contract.

Thereby, the Pilatos created an



incident, stopped performing while Han continued to perform, hired an attorney, and filed suit on January 30, 1979 against Han for breach of contract, fraud, and conversion. On March 9, 1979 Han filed a cross-complaint against the Pilatos alleging breach of contract and abuse of process. Petitioner went to trial in pro se believing as long as he told the truth he would win the case.

It was to this Petitioner's surprise when the Plaintiff and their attorney deliberately introduced a false $2,000 into evidence and fraudulently corroborated testimony to mislead the jury.

Such conduct for both the Pilatos and their attorney clearly comes under California Civil Code 1710(1) on deceit which states:

"A deceit, the suggestions, as a fact, of that which is not

true, by one who does not believe it to be true."

California Business and Professional Code 6068 also applies in dealing with attorneys honesty.

## REASONS FOR GRANTING THE WRIT.

**A judgment rendered against petitioner was the result of the plaintiff and their attorney, through false testimony and fraudulent evidence during trial, and the petitioner was unable to effectively oppose it.**

There is evidence that an increasing number of lay persons are representing themselves in court[3/] Therefore, the rights of many people may be affected.

There are many reasons a lay person wants to represent himself in court. In all probability it could be the high cost of hiring an attorney or it could be mistrust of attorneys and also one may believe he's absolutely right and feels he's done nothing wrong, therefore

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3/ Lexis, Mead Data Central, a computerized legal research information bank provided that in all 50 states, there were 813 Appellate Opinions rendered in 1980 by Counsel in Pro Se; 925 in 1981; 1081 in 1982; 1216 in 1983 and 1495 in 1984. Thus far in June of 1985, there have been 764.

shouldn't need anyone to speak for him and he can win his own case.

A pro se's right to manage his own case in court is constitutional and statutory based. He should conduct himself properly in court. It is his obligation to the court to be able to prove his cause of action and follow the rules of evidence and procedure correctly. He must stand up for what he bargained for; that is, when he chose to represent himself in court. However, he's entitled to a fair trial and the judge has to be impartial. The opposing counsel must treat him equally, as every party stands equal before the law. If he loses it's fair and square.

The court realizes a lay person is no match for a trained and experienced attorney. As we can see in Johnson vs. Zerbst, (304 U.S. 458, 1937) Justice Black states:

> "It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before the tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel."

Likewise, in Faretta v. California, (422 U.S. 802 (1975)) Chief Justice Burger in his dissenting opinion, believes an unequal contest between an uncounselled lay defendant and trained state prosecutors only serves to undermine the legitimacy of the adversarial process.

More importantly, the judicial system is an adversary process whereby an attorney must do the best for his client, yet still maintain his professional ethics. To do otherwise, such as introducing false

evidence and corroborating testimony, would constitute committed fraud upon the court, which is contrary to justice.

The wrongdoing attorney will probably not take the chance presenting false evidence and corroborating testimony if the opposing counsel were a seasoned and experienced attorney. However, the wrongdoing attorney, when he faces a pro se in court, has a very good chance of winning his case by using false evidence and corroborating testimony.

Usually on the day of trial, the trial judge realizes for the first time one of the parties before him is a pro se. In order to be impartial, the judge warns the pro se party to seek counsel and also warns him he cannot help him practice law. Most judges are reluctant to try a pro se case and get impatient.

A well prepared corroborating testimony

and false evidence is difficult to detect by the judge or the jury. As a result, the pro se does not have a fair trial. Usually this is the end of his case and he has to suffer for many years to come. The consequence of injustice is unbearable.

In talking to a Bailiff in the courtroom, this petitioner was told there has never been a pro se win his case in this courtroom for so many years. In talking with attorneys, they have also indicated they boast of the things they can do to a pro se.

Yet, the Constitution guarantees a pro se the right to go to trial, bu where is the safeguard of that right?

This is similar to the right to vote. It's also a constitutionally guaranteed right, where in the past, some states, in order to prevent certain classes of citizens from voting, set up literacy

tests or voting tax which violated the rights of the eligible voters. But, there is a safeguard, judicially and legislatively to protect the voters' rights.

**THERE IS NO RECOURSE ONCE YOU FAIL AT THE TRIAL.**

From the beginning, our state and national constitution and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunal in which every party stands equal before the law. On appeal, the judgment in the lower court is presumed correct. The chances for overturning the jury's verdict on appeal is practically impossible.

Under these circumstances, this petitioner strongly urges the court to review the issue presented. The court should set guidelines to safeguard such

rights procedurally and substantively.

The right to represent oneself is a good one and a constitutional right, yet there are no safeguards either judicially or legislatively to protect those rights being deliberately violated by opposing counsel in the judicial process.

One of the ways to reduce the pro se's rights being violated is to allow the pro se to sue the opposing counsel and thus bring out all the true facts of the case.

**CONCLUSION**

The chances of being heard is very remote, but this petitioner believes there is a genuine issue before this court. There's a saying "evil will flourish if good people do not do anything."

Respectfully submitted,

Kwang-Wei Han

Kwang-Wei Han
In Pro Per

# APPENDICES

**APPENDIX "A".**

**Judgment on Verdict in Open Court.**

Superior Court of the State of California, County of Orange.

Toney Pilato and Brigitte Pilato, Plaintiff, vs. Kwang-Wei Han, Irvine Safety Supply, Inc., and Does 1 through 10, inclusive, Defendants. No. 30-64-11.

Filed: January 30, 1979.

This cause came on regularly for trial before the above-entitled Court on April 6, 1982, the Honorable Mark A. Soden, Judge presiding, with a jury, in Department 25, F. Michael Woodland appearing as attorney for plaintiffs and defendant, Kwang-Wei Han, appearing in propria persona, and Dennis Orphan appearing as attorney for defendant, Irvine Safety Supply, Inc. and a jury of 12 persons was regularly impaneled and sworn to try the action. Witnesses on the part of the plaintiffs and the defendants

were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into Court, and being called answered to their names and duly rendered their verdict in writing in words and figures as follows, to-wit:

"TITLE OF COURT AND CAUSE" We, the jury in the above entitled action, find for the Plaintiffs named below and give damages as set opposite the names as follows: Plaintiffs Toney Pilato and Brigitte Pilato Compensatory Damages $28,635.00, Interest $13,947.00 Punitive Damages $12,500.00, Total Damages $55,082.00. As to said Plaintiffs, our findings and award of damages are against the Defendant or Defendants: KWANG-WEI HAN and IRVINE SAFETY SUPPLY, INC. DATED: 19 April 82 John C. Olsa, III, Foreman."

**APPENDIX "B".**

**Minute Order by the Trial Court**

Superior Court of the State of California, County of Orange.

Toney Pilato and Brigitte Pilato, Plaintiff, vs. Kwang-Wei Han, Irvine Safety Supply, Inc., and Does 1 through 10, inclusive, Defendants. No. 30-64-11.

Filed: January 30, 1979.

This cause came on regularly for trial before the above-entitled Court on April 6, 1982, the Honorable Mark A. Soden, Judge presiding, with a jury, in Department 25, F. Michael Woodland appearing as attorney for plaintiffs and defendant, Kwang-Wei Han, appearing in propria persona, and Dennis Orphan appearing as attorney for defendant, Irvine Safety Supply, Inc.

After the jury's verdict was entered on April 19, 1982, the defendants moved for a

New Trial, the Court now makes its ruling as follows:

"The above Motion for a New Trial having been taken under submission, the Court now makes its ruling as follows:

The Court finds that the Pilatos paid $14,874 for gloves ordered by Han; that the contract provided for additional payments of $12,000 for a total of $26,874 and that plaintiffs are only entitled to interest provided by law on that sum from the date of the jury verdict, April 9, 1982; that a reasonable sum for punitive damages is the sum of $8,000: therefore, a new trial is granted on the ground of excessive damages, subject to the condition that the motion for a new trial is denied if the plaintiffs consent to a reduction of the verdict and notifies defendants in writing on or before July 20, 1982 that plaintiffs will accept the

sum of $34,874 with interest at the legal rate from April 19, 1982 until the judgment is paid plus costs of suit.

ENTERED: 7-2-82

MARK A. SODEN

Judge of the Superior Court

**APPENDIX "C".**

**Opinion of Court of Appeal**

In the Court of Appeal of the State of California, Fourth Appellate District, Division Three.

Toney and Brigitte Pilato, Plaintiffs, Cross-Defendants and Respondents, vs. Kwang-Wei Han, Irvine Safety Supply, Inc., and Does 1 through 10, inclusive, Defendants, Cross-Complainants and Appellants. No. G000159 (Super. Ct. No. 30-64-11).

Filed: May 14, 1985.

APPEAL from a judgment of the Superior Court of Orange County, Mark A. Soden, Judge. Affirmed.

Kwang-Wei Han, in pro. per., for Defendant, Cross-Complainant and Appellant.

Dennis P. Orphan, for Defendant, Cross-Complainant and Appellant Irvine Safety

Supply, Inc.

Parkin & Woodland, Inc., F. Michael Woodland, for Plaintiffs, Cross-Defendants and Respondents Toney and Brigitte Pilato.

In March 1978 Han, designated "Buyer," entered into a contract with the Pilatos as "Seller." The Pilatos were to place $40,000 in a savings account as collateral for letters of credit they issued for the purchase of gloves to be eventually resold by Han. The aggregate amount of outstanding letters of credit was not to exceed $40,000. Each would be addressed to a particular manufacturer for a specific type and quantity of gloves, to be determined solely by Han. The gloves could be withdrawn for resale by Han in value increments not to exceed $10,000. When that amount was repaid he was entitled to an additional $10,000 worth on open account. He was also permitted to

purchase outright from the Pilatos for cash in the event he had reached his credit limit.

The Pilatos directed all gloves delivered to Han's warehouse, where they were separately stored and clearly marked "Toney Pilato." The contract stated Han agreed "that [the Pilatos] may store such industrial gloves as have not been withdrawn by [Han], in a locked area, the key to which shall be in the possession of [the Pilatos]." Title to the gloves in the locked area remained in the Pilatos until they received full payment for them.

Upon receipt of the stated $10,000 payments or the cash, the Pilatos were to purchase replacement gloves as designated by Han. They were granted the unrestricted right to enter the locked area without notice to Han and to take

inventory. Additionally, Han agreed to pay $16,000 to the Pilatos, in $4,000 increments, in September of 1978, March and September of 1979, and March of 1980. He further agreed to pay all costs and expenses in excess of the actual purchase price of the gloves.

By the end of May, letters of credit had been issued totalling $15,837. In July, Mrs. Pilato was hired by Han as an office worker; one of her assignments was to track the Pilato inventory and prepare new letters of credit when appropriate. In August, Han paid $10,000 toward his first series of withdrawals and the first $4,000 payment. By the end of September, the Pilatos had covered four of the original five letters of credit (totalling $9,915.60, leaving Han with an $85 credit in the business account). One $5,922 document, due in December, was still

outstanding. Four additional letters of credit had been issued in the amounts of $9,240 (July), $1,240 (Aug. 7), $18,793.20 (Aug. 24) and $4,394 (Sept. 20), resulting in a total of $39,420.40.

By the same date, Han had withdrawn $9.818 worth of gloves on credit. He then proceeded to request cash purchases. Three transactions, totalling $4,967.20 were allowed by Mrs. Pilato and reimbursed by Han shortly after each withdrawal. A fourth transaction, encompassing withdrawals from November 3 through the end of the month, and totalling $1,761.20, was not reimbursed prior to December 9.

On December 9, the Pilatos arrived at the warehouse to take inventory of their remaining stock. An altercation arose with Han who claimed the Pilatos threatened to remove all the stock. The

Pilatos denied any such threat or intention: rather they asked him to please not request more withdrawals when he was already over his limit. Han did not interfere with the inventory check, but did call the police. When the Pilatos exited the locked area they were ordered from the premises. Han immediately had the locks changed and refused the Pilatos entry unless supervised. They were not allowed a key. One supervised entry was allowed on December 15 and inventory was valued at $22,958.08 wholesale.

Subsequent to the lockout, the $5,922 letter of credit became due and was covered by the Pilatos ($84.40 excess in business account, $4,967.20 cash from Han, $870.40 out-of-pocket by Pilato). By letter on the same date, Han sent $820.40 as repayment for his personal expense in that letter of credit. Thereafter on December 26, Han paid $18,793.20 (the

amount of the letter of credit due on that date); the check bounced but was later replaced and the letter of credit was covered on January 4 (nine days late). The three remaining letters of credit were paid by the Pilatos in February and March of 1980 ($14,874).

The Pilatos filed suit in January for breach of contract, fraud and conversion,[1/] naming as defendants Han and Irvine Safety Supply, a company owned by Han's sister and located in the same warehouse as Han & Co. Irvine's motion for summary judgment was denied. Following trial by jury, a verdict was rendered against both defendants in the amount of $55,082 ($28,635, compensatory; $13,947, interest; and $12,500, punitive). Following notice of motion for new trial,

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1/ The fraud case of action was dismissed.

the court granted the motion on the ground of excessive damages, subject to its denial if the Pilatos consented to the verdict's reduction to $38,874 ($26,874, compensatory; $8,000, punitive). The Pilatos consented and both defendants appeal.

## HAN'S APPEAL

### I

Han claims he had "not breached the contract by selling gloves beyond the authorized level." He cites testimony by Mrs. Pilato that he was $2,000 over his $10,000 limit in late September. However, the Pilatos admitted at trial there was an error in their assessment, and consequently in the chart prepared by their attorney. Thus, Han was not over his limit as of that date, although he was "about $1,761 over his limit" (Han's

opening brief) on December 9. The issue is irrelevant in any event as both parties testified at trial no deviation from the contract was considered material prior to December 9, 1978.

II

Han next states "the Pilatos claim the contract won't work"; he then insists it is a workable contract as evidenced by the conduct of the parties in the issuance and repayment of the first letters of credit: numbers 1, 2, 3 and 5 were repaid through Han's August 7, $10,000 payment (81-112 days early).

He contends this is proof the contract will work and belies the Pilatos' testimony at trial. He states the Pilatos claimed the "contract would not work [because] 'there was no way he [Han] could pay for the letter of credit in 180

days.'" However, the true answer given at trial by Mr. Pilato was "that there was no way we [the Pilatos] were going to be able to meet these letters of credit payments as they became due at the bank."

Their concern was well-founded; many of the letters of credit were due considerably less than 180 days from issuance, while Han granted himself 180 days to repay the Pilatos after withdrawal of a $10,000 increment. Again, the issue is moot. All letters of credit were timely paid prior to the lockout and all parties agreed there was no concern worthy of legal action prior to that date.

III

Han contends the Pilatos breached the contract because they received the $4,967 cash payment for gloves and did not immediately issue new letters of credit.

Three obstacles block his recovery. First, he had not repaid the final "outright for cash" withdrawal ($1,761); second, he testified at trial he considered no problem prior to the lockout (December 9) sufficient to constitute a breach; and third, the collateral limit had been reached by the then outstanding letters of credit. No new ones could be issued.

Moreover, letter of credit number 4, issued in May, was due December 11. Mr. Pilato testified Han told him to use the $4,967 for that purpose. Although Han testified he didn't remember any discussion whereby he agreed to guarantee that all letters of credit would be paid on time, he did admit his payments toward the December 11 due date for letter of credit number 4 were made with that in mind. He in fact wrote to the Pilatos on

the 11th of December, itemizing the payments he had made to date (including the $4,967 which he now claims should have been used for repurchase) and enclosing a check for the balance of $820.40 as "total payment due [from Han] on December 11, 1978, Letter of Credit . . . ."[2/]

In his deposition, the following colloquy occurred:

"A What was finally decided? What did you decide concerning the hundred eighty days in the subsequent discussion? Was there any change made? Anything that you told him? [¶] A I think -- I think I believe -- I think I believe we moved the payment day earlier. I am not sure.

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2/ Letter of Credit number 4, $5,922, repaid as follows:

| | |
|---|---|
| $4,967.20 | Han's cash purchase |
| 84.40 | business account balance |
| 820.40 | December 11 check from Han |
| $5,872.00 | |

The letter of credit was actually covered by the Pilatos' personal check for $870.40 because Han's reimbursement was in error.

Yeah. I'm not sure [¶] Q Do you remember how much earlier? [¶] A I think -- I think sometimes several months earlier. I'm not completely sure of just exactly what it was. I believe there is something in my mind, somebody -- there was something we changed somewhat."

While Han claims he asked Mrs. Pilato to complete additional letters of credit for the $4,967.20, the Pilatos denied this occurred. No orders could be placed until Han selected the quantity and type of gloves he wished as well as the appropriate manufacturer. The Pilatos testified Han never notified them of his choices; rather, he agreed the November cash payments should be utilized to cover the letter of credit due December 11. Moreover, no additional letters of credit could be issued -- all parties agree the outstanding credit totaled $39,420.20 on

the date of the lockout.

IV

Han next claims the lockout was not a breach of contract on his part because 1) it was necessary to "preserve evidence that he did not steal any gloves"; 2) "he had the exclusive right to withdraw the gloves"; and 3) "he was responsible for the security of the gloves." The jury clearly disagreed with his version of the December 9 incident and chose to believe the Pilatos, who testified they did not threaten to remove the glove stock, merely wishing to inventory as was their right.

The Pilatos admit there was an argument when Mr. Pilato asked Han to "get off his wife's back" about asking for withdrawal of more gloves when he did not immediately pay for them in cash (at a time when he had already reached his $10,000 credit

limit). All parties agree Han at that point had in his possession $9,858 worth of gloves withdrawn on credit plus those of $1,761 value he had withdrawn on a "cash" basis, which remained unpaid. The Saturday checkup occurred because Mrs. Pilato was not there on weekends "for [Han] to ask if he can take [gloves]."

Han, himself, testified prior to the lockout Mrs. Pilato held the key to the Pilato stock and he "solely let her control the thing." On the 9th he called a locksmith to change the locks, did not give the Pilatos a key and informed his employees not to allow them in the warehouse. Mrs. Pilato was not employed by Han after that date.

Thereafter, without the Pilatos' permission, he sold the stock at an admitted profit ranging from 50 to well over 100%. Han perhaps misunderstands our

role on appeal. Our power "begins and ends with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact. . . . The trier of fact is the sole arbiter of all conflicts in the evidence, conflicting interpretations thereof, and conflicting inferences which reasonably may be drawn therefrom; is the sole judge of the credibility of the witnesses; may disbelieve them even though they are uncontradicted if there is any rational ground for doing so, one such reason being the interest of the witnesses in the case; . . ." (Horn v. Oh (1983) 147 Cal.App.3d 1094, 1099, emphasis added.) Our review of the entire record discloses substantial evidence to support the jury's determination Han had no basis for locking out the Pilatos and appropriating their inventory.

V

Han insists there was no conversion "because there was nothing to convert," i.e., he continued to pay the letters of credit. We disagree. Han's conversion occurred on December 9 and the payments to which he refers were made after[3/] he locked out the Pilatos and refused to give them a key. He took dominion and control over the entire stock, none of which did he have a right to withdraw on the 9th because he had not made "payment to the Seller of [the] preceding increment of $10,000." (Paragraph 2 of the contract.) He then proceeded, without the Pilatos' permission, to sell the entire stock.

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3/ He met only one of the outstanding letters of credit (excluding the $820 remitted to reimburse the Pilatos on number 4), and the damages were reduced by the amount of those payments. Acceptance of these sums by the Pilatos amounts to little more than mitigation of damages.

"'Conversion is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein. It is not necessary that there be a manual taking of the property; it is only necessary to show an assumption of control or ownership over the property, or that the alleged converter has applied the property to his own use.'

. . . [¶] It is clear that legal title to property is not a requisite to maintain an action for damages in conversion. To mandate a conversion action 'it is not essential that plaintiff shall be the absolute owner of the property converted but she must show that she was entitled to immediate possession at the time of conversion.'" (Hartford Financial Corp. v Burns (1979) 96 Cal.App.3d 591, 598.)

The Pilatos were to retain title until

repaid for the gloves. They alone were entitled to the keys to the locked area where the gloves were stored. Absent a valid reason or privilege for denying them access to their gloves, Han's assertion of dominion and control (admitted in his declaration attached to Irvine Safety Supply's motion for summary judgment) constitutes an act of conversion.

VI

For the reasons discussed ante we need not address Han's insistence he substantially performed the contract and the Pilatos were the breaching parties.4/

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4/ Although not raised by the defendants, we find the compensatory damages amply supported by the evidence. The jury instructions are not in the record and the verdict returned by the jury does not indicate upon which cause of action liability was predicated. Nor does it indicate their method for arriving at the compensatory damage total. It was
(Footnote continued on next page)

VIII

Han filed a supplemental brief which states the following issue: "The corroboration of testimony of the

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apparently based on the conversion resulting from Han's breach.

When the court reduced damages, it stated by minute order, "The Pilatos paid $14,874 for gloves ordered by Han [and] the contract provided for additional payments of $12,000 for a total of $26,874 . . . [A] reasonable sum for punitive damages is the sum of $8,000 . . . ." To the extent there appears any ambiguity, defendants are not entitled to relief. First, they did not raise the issue in the trial court or on appeal and are deemed to have waived it.

Second, "where proof [of conversion] establishes an injury beyond that which would be adequately compensated by the value of the property and interest, the court may award such amounts as will indemnify for all proximate reasonable loss caused by the wrongful act." (Lint v. Chisholm (1981) 121 Cal.App.3d 615, 624-625.)

Third, and most importantly, the judgment can be upheld purely on the conversion cause of action. In Mayes v. Sturdy Northern Sales, Inc. (1979) 91 Cal.App.3d 69, appellants attacked a "judgment because of ambiguities about the theory upon which the court based its decision." The appellate court stated, "It is well established that if a trial court's decision is 'right upon any theory

(Footnote continued on next page)

plaintiff, Mrs. Pilato, with her attorney in open court during trial to cover up a mistake or error for the sole purpose of influencing the jury may constitute collusion which is a prejudicial error." He also filed an augmentation of the record: a reporter's transcript of opening and closing arguments, to which he makes no reference.

His entire argument is a reiteration of the point addressed in Paragraph I above. However, the thrust now is collusion between Mrs. Pilato and her attorney, i.e., false testimony that Han had withdrawn over his limit on September 30.

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of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.' [Citations.] The factual issues presented below were the same for either theory of recovery [contract and tort], and appellants were given ample opportunity to present their version of the business transactions among the parties." (Id., at p. 83.)

He relies on the chart of events prepared by the Pilatos' attorney. There was an error in the value of the gloves Han held on September 30. Mrs. Pilato admitted the amount on the chart for the date of September 30 was incorrect and agreed to Han's figure of $9,818; she did not know the origin of the $2,000 discrepancy.

Her attorney then asked her, "In compiling all these figure, that is the final compilation, they were given to me in rough; is that not correct?" [Answer, "Yes."] "I made out the chart; is that not correct?" [Answer, "Yes."] Han finds this colloquy "highly prejudicial." He states, "To say the least, it was inappropriate for [the attorney] to raise such questions because he knew they were based on false evidence. It was unmistakeably an intentional false

testimony for the sole purpose of trying to impress the jury that what the Pilatos did wrong was not willful. But, because [the attorney] had the wrong material from Mrs. Pilato he made out the wrong chart, and he made a wrong accusation. Had they simply admitted their mistake by saying their error was an accounting error, there would be no question raised today." (Emphasis added.) He then refers to the chart and claims the majority of the figures are "precise" and therefore cannot be "approximate" as stated by the attorney.

We find no evidence of collusion. Nor can we feel the jury was inflamed by the word "approximation." Moreover, the Pilatos' admission of error in the chart could only work to Han's advantage. The jury might well have inferred if they were incorrect in that matter, their other

testimony was open to question. However, the credibility of witnesses is an issue for the trier of fact. In any event, Han cross examinated Mrs. Pilato at length on the disputed figure which in the final analysis is irrelevant -- as noted, ante, all parties agreed no condition prior to December 9 was sufficiently bothersome to warrant discontinuing the contract.

APPEAL BY IRVINE SUPPLY

Irvine argues there was insufficient evidence to support an award of damages against it, insisting it was not a party to the Han-Pilato contract and Han was not its agent in the transaction. The Pilatos claim the evidence shows Han and Irvine were so intermingled from the corporation's inception that all Han's activities, and particularly his actions on December 9, were also those of Irvine. The jury agreed and substantial evidence appears to support its determination.

Jane Han was the titular president and sole shareholder of Irvine, incorporated about the time the Han-Pilato contract was negotiated. Her deposition states she purchased from her brother the right to sell gloves in a certain territory, an asset she transferred to the corporation. She stated she paid $2,000 to him but had

"misplaced" all receipts or contracts which would corroborate the transaction. Han then acted as salesman and general manager for the first year to establish the business (during the life of the Han-Pilato contract.)

Mrs. Pilato was hired by Han in July 1978. Her salary, however, was paid from the Irvine account and Han informed her she was an employee of both Irvine and Han & Co. She was in fact sole secretary for both. Her paychecks usually bore the name "Jane Han" but were always pre-signed. Han testified he didn't remember if he signed for her.5/ When glove orders were taken Han instructed her which invoices to utilize, either Han & Co. or Irvine. However, Mrs. Pilato testified the orders

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5/ After Mrs. Pilato left his employ, Han testified, he hired another girl who also "help[ed] with Irvine Safety as well. It is a family affair. (Emphasis added.)

were filled with the same supply of gloves, including the Pilatos' inventory.

During the entire time she was employed at the warehouse, in which the two companies were located, Mrs. Pilato at no time saw, met or spoke to Jane Han. Although he denied it at trial, Han, in an earlier deposition, had stated he provided all costs for the incorporation of Irvine Safety Supply. Moreover, when asked at trial if he had paid the Pilatos for letters of credit, using Irvine Safety Supply checks, he replied, "I don't know. Maybe. I don't know. I definitely do not know. I definitely think -- I don't know."

There is sufficient evidence in the record from which the jury could conclude that Han was in fact the undisclosed agent of Irvine Safety Supply and that his actions at all times were taken for its

benefit as well as his own.6/

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6/ Irvine also claims the court erred in denying its motion for summary judgment. In light of our discussion above, the issue is moot. Irvine received a trial on the merits of its contention there was no agency relationship with Han. We have reviewed and affirmed the jury's determination.

Although we need not decide the issue, we question whether a denial of a summary judgment, which is not an appealable order, may be reviewed on its merits following appeal from judgment after trial.

## SANCTIONS

The Pilatos have requested sanctions for a frivolous appeal. We are aware of, and sympathize with, the number of responses they have been obliged to prepare. However, "to avoid a serious chilling effect on the assertion of litigants' rights," Han has "a right to present issues that are arguably correct, even if it is extremely unlikely that [he] will win on appeal. An appeal that is simple without merit is not by definition frivolous and should not incur sanctions." (In re Marriage of Flaherty (1982) 31 Cal.3d 637, 650.)

The judgment is affirmed. Respondents to receive costs.

s/SONENSHINE
SONENSHINE, J.

WE CONCUR;

s/TROTTER
TROTTER, P.J.

s/WALLIN
WALLIN, J.

**APPENDIX "D".**

**Federal Question Raised to California Supreme Court.**

California Supreme Court.

Toney and Brigitte Pilato, plaintiff, vs. Kwang-Wei Han, defendant. 4 Civ. G000159 (Orange County Superior Court No. 30-64-11).

Filed: June 24, 1985.

> IV. DUE PROCESS AND EQUAL PROTECTION GUARANTEES MANDATE THAT PERSONS EXERCISING THEIR CONSTITUTIONAL RIGHT TO REPRESENT THEMSELVES IN CIVIL MATTERS BE AFFORDED AT LEAST THE MOST MINIMAL PROTECTIONS BY THE TRIAL COURT FROM OVERREACHING BEHAVIOR BY OVERZEALOUS ADVERSARY COUNSEL.

This issue is similar to a situation where a child is being sent to a school to be educated. The school lends itself out as an educational institution to mold and guide the child to be a good citizen and, yet in the process, teachers of the school may molest the child which causes harm

permanently. When that happens, the teachers and the school should be punished under the law. There are laws to deal with this.

It is a well established tenet of Constitutional law that a person, as his own sole choice, may prosecute and/or defend his own cause in any court in the land [U.S. Const., Amend. VI, Calif. Const., Art I, Sec. 14, 15; 28 U.S.C. 1654.] At the same time, the right to due process of law and equal protection of the law are also of Constitutional dimension [U.S., Const., Amend. V, XIV; Calif. Const., Art. I, Sec. 7.] To fully effectuate and make compatible these rights, Han would urge that at least minimal safeguards must be imposed by trial courts to protect pro per litigants from the antics of overzealous adversaries.

In the case at bench, and through the fraudulent collusion of the plaintiffs and their counsel, the plaintiff's were able to parade before the jury false and misleading evidence, designed to support their case as well as undermine in the jury's eye the credibility of Han. Han, pro per at trial and unschooled in the law, as well as devious litigation strategy, was unaware, until it was too late, of what the plaintiff's intended to accomplish. Although he was able, through the process of cross-examination, to prove for all the false nature of the testimony, it was by then too late. The jury had already heard the evidence. The die was cast.

Han does not suggest that the court's have a duty to try a pro per litigant's case for him, but, as this Honorable Court is well aware, the number of cases being

handled in propria persona is on the increase and with it, a priori, the percentage of cases in which experienced counsel are able to take full advantage of their less experienced opponent. Han would urge this Court that the time has come for this Court to establish at least minimal guidelines for trial courts in synthesizing the operation of the Constitutional guarantees outlined above for if this Court chooses not to do so, the problem will only get worse. Han also suggests that his case is the perfect vehicle through which this Court can act.

**APPENDIX "E".**

Clerk's Office, Supreme Court, 4250 State Building, San Francisco, California 94102.

July 24, 1985.

I have this day filed Order REVIEW DENIED.

In re: #G000159, TONY PILATO AND BRIGITTE PILATO vs. KWANG-WEI HAN.

Respectfully,

Clerk